No. 03-1603

Supreme Court, U.S.
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In The

Supreme Court of the United States

BLUE CIRCLE, INC., an Alabama Corporation,

Petitioner,

v.

GEORGIA DEPARTMENT OF REVENUE and BART L. GRAHAM, REVENUE COMMISSIONER,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of Cobb County, State Of Georgia

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

I.

Whether this Court has jurisdiction to grant certiorari where Petitioner did not raise its federal constitutional objections to Georgia's appellate procedure until it filed its motion for reconsideration before the Georgia Supreme Court and where there exists an independent state procedural ground barring this Court's consideration of the federal constitutional claims Petitioner attempts to raise.

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STATEMENT OF THE CASE

Because the Petition misstates the record evidence and fails to provide this Court with a correct procedural history of this matter, Respondents briefly set forth the pertinent facts and procedural history.

The above captioned matter arose from the Respondents' denial of Petitioner's seventeen Claims for Refund ("Claims") of state and local sales and use taxes allegedly paid on its purchases of various items used at its manufacturing facility in Georgia. Petitioner claimed an exemption from the tax pursuant to O.C.G.A. § 48-8-3(35) (the "Industrial Materials Exemption") for the tax periods September 1, 1991 through September 30, 1995 ("the Refund Period").

In August of 1992, after a conference with the Petitioner, Respondents issued a determination to the Petitioner on the taxability of coal, coke, grinding materials and shotgun shells as used at Petitioner's Georgia cement manufacturing plant. On October 16, 1995, Petitioner acquiesced on the taxability of the shotgun shells but, pursuant to O.C.G.A. § 48-2-35, filed its Claims with respect to refractory brick, grinding materials (iron chains and iron balls) and coal and coke purchased during the Refund Period. If Petitioner had desired a hearing before the Commissioner on the taxability of these items, it was required to, but did not, request such a hearing on the Claims as provided by O.C.G.A. § 48-2-35(b)(2).

Nevertheless, Respondents held a second informal conference with Petitioner. After again considering Petitioner's refund claims, Respondents denied Petitioner's

refund claims by letter dated April 17, 1996.[1] Thereafter, Petitioner instituted a refund action in the Superior Court of Cobb County, Georgia.

The parties filed cross motions for summary judgment in the superior court. On May 5, 2003, the superior court granted Respondents' motion for summary judgment.

On June 2, 2003, Petitioner filed a Notice of Appeal to the Georgia Court of Appeals in the Superior Court of Cobb County pursuant to O.C.G.A. § 5-6-34. However, because the Superior Court's order appealed reviewed a decision of an administrative agency, Petitioner was required to file an Application for Discretionary Review in the Georgia Court of Appeals. O.C.G.A. § 5-6-35. This procedural error deprived the Georgia Court of Appeals of jurisdiction to hear the appeal. *Olin Corporation v. Collins*, 493 S.E.2d 493 (Ga. 1992). Therefore, the Georgia Court of Appeals properly dismissed the appeal.

Petitioner filed a motion for reconsideration in the Georgia Court of Appeals, which was denied. Petitioner then sought a discretionary grant of certiorari from the Georgia Supreme Court, which also was denied. Petitioner then filed a motion for reconsideration in the Georgia Supreme Court in which, for the first time, it raised federal claims of due process and equal protection. The Georgia Supreme Court denied the motion for reconsideration.

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[1] Petitioner makes much of the fact that the letter identified O.C.G.A. § 48-8-3(35)(B) as a regulation rather than a statutory provision. *Petition For A Writ Of Certiorari*, Opinions Below ¶ 1; p. 6. Inasmuch as Petitioner's original Claim asserted an exemption under that statute, Petitioner cannot seriously claim this clerical error somehow deprived it of due process.

Petitioner then filed its Petition for Writ of Certiorari in this Court.

REASONS FOR DENYING THE WRIT

In a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(a), the burden is on the Petitioner to show that the constitutional question was either addressed by, or properly presented to, the state court that rendered the decision this Court is asked to review. Sup. Ct. R. 14.1(g)(i); *Adams v. Robertson*, 520 U.S. 83 (1997). No Georgia court considered or decided Petitioner's federal constitutional claims. *See Petition for Writ of Certiorari*, Appendices A, B, D, and E.

Principles of comity in the federal system require that the state courts be afforded the opportunity to respond to attacks on state authority based on federal law. *Webb v. Webb*, 451 U.S. 493 (1981). Consequently, Petitioner has the burden of showing that the state courts had a fair opportunity to address the federal question raised. *Illinois v. Gates*, 462 U.S. 213, (1983); Sup. Ct. R. 14.1(g)(i). Petitioner may do so by showing that it raised the issue at the time or in the manner required by state law, or that it presented the issue with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. at 87. Petitioner did not satisfy either of these requirements.

I. Petitioner Did Not Present Its Federal Claims At The Time Or In The Manner Required By State Law.

This Court has consistently held that it is without jurisdiction to hear a case where the federal issue was not raised properly below. *Webb v. Webb*, 451 U.S. 493 (1981). Georgia law provides that certain judgments and rulings are directly appealable, O.C.G.A. § 5-6-34(a), while appeal in other cases must be by an application for discretionary appeal ("application"). O.C.G.A. § 5-6-35(a). Appeals from decisions of the superior courts reviewing decisions of state and local administrative agencies are among those cases where appeal is required to be by application. O.C.G.A. § 5-6-35(a)(1).

The Georgia Department of Revenue ("Department") is a state administrative agency. O.C.G.A. § 48-2-1. Consequently, appeals from decisions of the superior courts reviewing decisions of the Department are required to be by application. *Olin Corporation v. Collins*, 413 S.E.2d 193 (Ga. 1992) (appeal from denial of claim for refund); *Miles v. Collins*, 384 S.E.2d 630 (Ga. 1989) (appeal from tax assessment).

Therefore, the time and manner for Petitioner to raise the issues of the sufficiency of Respondents' review of its refund claims, its right to direct appeal, and its due process and equal protection claims properly would have been made in an application. Had Petitioner followed the correct procedural process, and the Georgia Court of Appeals denied its application, the issues it attempts to raise before this Court would have been preserved for further review. However, Petitioner did not file the required application. Consequently, Petitioner did not raise the issue at the time or in the manner required by state

law and this Court is without jurisdiction to consider Petitioner's claims.

II. Petitioner Did Not Raise Its Federal Claims With Fair Precision And In Due Time.

Neither did Petitioner raise its federal claims with "fair precision and in due time." *Adams v. Robertson*, 520 U.S. at 87. This Court has consistently held that the mere citation to a federal case in the midst of an unrelated argument is insufficient to inform a state court that a federal claim has been raised. *Id. See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) (generic reference to Fourteenth Amendment not sufficient to preserve a constitutional claim); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71 (1988) (vague appeal to constitutional principles does not preserve constitutional claim); *Webb v. Webb*, 451 U.S. 493 (1981) (failure to raise clearly constitutional question deprived Court of jurisdiction to hear the appeal). At a minimum there should be no doubt from the record that a claim under a federal statute or the federal constitution was presented to the state courts. *Webb v. Webb*, 451 U.S. at 501. A party may not preserve a constitutional challenge by generally invoking the Constitution in state court and then wait for review in this Court to specify its constitutional claims. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 77.

Petitioner's response to Respondents' motion to dismiss its appeal before the Georgia Court of Appeals was based solely on state law. Appellant's Response to Appellees' Motion to Dismiss pp. 1 through 2. Relying solely on *McCaughey v. Murphy*, 473 S.E.2d 594 (Ga. 1996), Petitioner asserted that Respondents' review of its refund

claims was inadequate, giving rise to a right to direct appeal. Although Petitioner made reference to *Reich v. Collins*, 513 U.S. 106 (1994), Petitioner did not raise a constitutional challenge to Georgia's appellate procedures.[2] *Id. See also Appellant's Supplemental Response to Appellees' Reply Brief in Support of Motion to Dismiss Appeal* p. 2 ("[i]mplicit in the Georgia Code is that the Appellee grants the taxpayer a meaningful review of his [sic] claim.").

The Georgia Court of Appeals granted Respondents' motion to dismiss. Petitioner then filed a motion for reconsideration in the Court of Appeals. Although Petitioner again cited to *Reich v. Collins, supra*, Petitioner did not raise either a due process or an equal protection claim.

Neither did Petitioner raise such a claim in its Petition for Certiorari in the Georgia Supreme Court. Petitioner's sole enumeration of error was that, "the Court of Appeals erred in failing to apply the two-tribunal requirement of *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996) to allow Appellant's direct appeal of its tax refund claim denial." *See Appellant's Petition for Certiorari* p. 9. Moreover, its general discussion of "constitutional due process" cites to the Georgia Constitution.[3] *Id.*

Not until Petitioner filed its motion for reconsideration in the Georgia Supreme Court did it raise and argue due process and equal protection pursuant to the federal constitution. Federal claims raised for the first time in a

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[2] It is worth noting that Petitioner's jurisdictional statement in its brief on the merits, filed subsequent to Respondents' motion to dismiss, also relied solely on *McCaughey. Appellant's Brief pp. 4 through 5.*

[3] Petitioner's brief raised no equal protection claim.

motion for reconsideration will not be reviewed by this Court. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. at 77.

III. Independent State Procedural Grounds Bar This Court's Consideration of the Petitioner's Federal Claims.

It is well settled that "failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule." *Michigan v. Tyler*, 436 U.S. 499, 512 (1978). As set out above, Georgia law provides an appellate procedure in which appeals from decisions of the superior courts reviewing decisions of an administrative agency such as the Georgia Department of Revenue are required to be by application. *Olin Corporation v. Collins*, 413 S.E.2d 193 (Ga. 1992) (appeal from denial of claim for refund); *Miles v. Collins*, 384 S.E.2d 630 (Ga. 1989) (appeal from tax assessment). Failure to follow the correct appellate procedure deprives the appellate court of jurisdiction to hear the appeal.

Georgia has a legitimate interest in enforcing this procedural rule. It both allows the appellate courts to ease their increasingly large case loads, *Scruggs v. Georgia Dep't of Human Resources*, 408 S.E.2d 103 (Ga. 1991), and to review expeditiously decisions of the superior courts reviewing decisions of administrative agencies without issuing an opinion in every case. *Tri-State Building & Supply, Inc. v. Reid*, 302 S.E.2d 566 (Ga. 1983).

Therefore, even if Petitioner had raised its federal constitutional claims in its response to Respondents'

motion to dismiss, the Georgia Court of Appeals would have been without jurisdiction to review or rule on the questions. Consequently, failure to follow the correct Georgia appellate procedure is an independent and adequate state ground of decision barring review in this Court.

In seeking to avoid this result, Petitioner relies on *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996). Such reliance is misplaced. In *McCaughey*, the Georgia Supreme Court held that when an administrative agency satisfies the statutory requirements for its review of a matter, and the superior court also reviews the matter, any appeal from the decision of the superior court must be made by application.

The statutory requirements for Respondents' review of a claim for refund are set out in O.C.G.A. § 48-2-35 ("Refund Statute"). The Refund Statute provides that it is the responsibility of the taxpayer to file a claim for refund that contains a "summary statement of the grounds upon which the taxpayer relies." O.C.G.A. § 48-2-35(b)(1). The taxpayer may provide the Commissioner with any information the taxpayer believes relevant at the time it files the claim. In addition to providing information, if the taxpayer desires a conference or hearing before the Commissioner, "he shall specify such desire *in writing* in the claim." O.C.G.A. § 48-2-35(b)(2) (emphasis added). Absent a written request, the Commissioner has no duty to provide a hearing, although he may do so, as he did twice in the instant matter, as a matter of accommodation. Ga. Comp. R. & Regs. 560-1-1-.12 (1965) (informal conference may be had at the discretion of the Commissioner).

Each of Petitioner's claims for refund contained the same five sentence paragraph (excluding the code section under which it was claiming the exemption) setting out its summary statement of grounds upon which it relied. The claims for refund did not contain a written request for a conference or hearing. The Petitioner complains that the Respondents' form contains no space for requesting a conference. *Petition* p. 6. However, this Court should note that the Respondents' form has instructions telling the taxpayer to "[a]ttach additional pages if necessary." Accordingly, there was clearly adequate space to request a conference. Furthermore, there is no evidence in the record that Petitioner was prevented from requesting a conference because of lack of space on the form, or for any reason.

Having received a claim for refund, the Commissioner has a statutory obligation to "consider information contained in the taxpayer's claim for refund, together with such other information as may be available." O.C.G.A. § 48-2-35(b)(3). Such other information includes, without limitation, information contained in the relevant statutes, regulations, case law, past rulings by the Department of Revenue ("Department"), and information gathered by Department personnel either from the taxpayer or otherwise.

Petitioner asserts that Respondents refused to consider information Petitioner supplied relevant to its claim. *Petition* p. 7. However, Petitioner's assertion that the Commissioner willfully disregarded his statutory duties fails because Petitioner is bound by its earlier admissions to the contrary. *See Martin v. Pierce*, 232 S.E.2d 170 (Ga. App. 1977) (party to an action is bound by material allegations made in his pleadings). Petitioner previously admitted that the Respondents responded to its requests for a

revenue ruling on the taxability of the items at issue in the litigation. Moreover, it is clear from the Commissioner's letter ruling that he was familiar with Petitioner's arguments and rejected them.

In addition, Petitioner previously admitted that the Commissioner held an informal conference to receive and consider the information Petitioner provided. Such information did not alter the Commissioner's determination. However, the Commissioner's letter to Petitioner after the conference evidences that he had carefully considered Petitioner's argument. Further, the letter provided the basis for the Commissioner rejecting such arguments as unpersuasive.

There simply is nothing in the record to support an allegation that the Commissioner refused to consider any evidence Petitioner presented. To the contrary, the record is replete with evidence that the Commissioner considered all of Petitioner's contentions before making his determination.

When the Commissioner has considered all of the information available and made a determination, he has a statutory duty to "notify the taxpayer of his action." O.C.G.A. § 48-2-35(b)(3). The statute does not require the Commissioner to issue findings of fact or conclusions of law. Petitioner admits that the Commissioner notified it of his determination. Accordingly, each and every statutory duty under the Refund Statute was satisfied.

Georgia law is clear that where an administrative agency makes a determination in accordance with its statutory duties and such determination is then reviewed by a superior court, any further appeal must be by application. *McCaughey v. Murphy*, 473 S.E.2d 762 (Ga. 1996).

Consequently, Petitioner's failure to follow the correct Georgia appellate procedure provides an independent and adequate state ground of decision barring review in this Court.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Respondents pray that this Court decline to grant the instant Petition for a Writ of Certiorari.

Respectfully submitted,

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